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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/798,997	03/12/2004	Dwight McKee	382/9-1788	6866

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EXAMINER

MCCORMICK EWOLDT, SUSAN BETH

ART UNIT PAPER NUMBER

1655

DATE MAILED: 01/05/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/798,997	Applicant(s) MCKEE ET AL.	
	Examiner S. B. McCormick-Ewoldt	Art Unit 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 20 October 2005.  
 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.  
 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1,3,5,6 and 8-23 is/are pending in the application.  
     4a) Of the above claim(s) 5 and 10-23 is/are withdrawn from consideration.  
 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
 6) ☒ Claim(s) 1,3, 6, 8-9 is/are rejected.  
 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \* c) ☐ None of:  
         1. ☐ Certified copies of the priority documents have been received.  
         2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
         3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

The amendment of October 20, 2005 is hereby acknowledged.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### **Election/Restrictions**

Applicant elected Group I and species, *Rhodiola rosea*, filed on April 26, 2005. Claims 5 and 10-23 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention. Election was made **without** traverse.

#### **Claims Pending**

Applicant has cancelled claims 2, 4 and 7. Claims 1, 3, 6, 8-9 are examined.

#### **Claim Rejections - 35 USC § 102**

The rejection of claims 1-3, 7-9 under 35 U.S.C. 102(b) as being anticipated by Krotzer (US 2001/0008641) have been withdrawn in view of Applicant's amendment.

The rejection of claims 1, 6 and 9 under 35 U.S.C. 102(b) as being anticipated by Mann *et al.* (US 2004/0005368 A1) have been withdrawn in view of Applicant's amendment.

#### **Claim Rejections - 35 USC § 103**

Claims 1-4 and 6-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Krotzer (US 2001/0008641) and Winston *et al.* (US 2003/0008048).

Krotzer (US 2001/0008641) discloses a composition that contains theobromine, calcium, chromium picolinate, chromium polynicotinate, magnesium, cocoa and cinnamon in the amounts claimed to provide a sense of well-being and tranquility ([0017]- [0021]). Krotzer does not disclose the extract of *Rhodiola rosea*.

Winston *et al.* (US 2003/0008048) disclose the use of *Rhodiola rosea* in a composition that gives a sense of emotional and psychological well-being ([0028], [0040], [0054]).

Applicant's arguments filed October 20, 2005 have been fully considered but they are not persuasive.

In response to **Applicant's argument** that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

**Applicant argues** that there must be some teaching, suggestion or incentive for doing what the Applicant has done. This is not found persuasive because these references show that it was well known in the art at the time of the invention to use the claimed ingredients in compositions that improve mood enhancement and energy. It is well known that it is *prima facie* obvious to combine two or more ingredients each of which is taught by the prior art to be useful for the same purpose in order to form a third composition which is useful for the same purpose. The idea for combining them flows logically from their having been used individually in the prior art.

In response to **Applicant's arguments** against the references individually by "pick and choose among the numerous ingredients," one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Based on the disclosure by these references that these substances are used in compositions to improve mood enhancement and energy, an artisan of ordinary skill would have a reasonable expectation that a combination of the substances would also be useful in creating compositions to suppress appetites and improve mood enhancement and energy. Therefore, the artisan would have been motivated to combine the claimed ingredients into a single composition. No patentable invention resides in combining old ingredients of known properties where the results obtained thereby are no more than the additive effect of the

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ingredients. See *In re Sussman*, 1943 C.D. 518; *In re Huellmantel* 139 USPQ 496; *In re Crockett* 126 USPQ 186.

Therefore the rejection is deemed proper and is maintained.

The rejection of claims 1-3 under 35 U.S.C. 103(a) as being unpatentable over Mann *et al.* (US 2004/0005368) have been withdrawn in view of Applicant's amendment.

It is noted to the Applicant that the amounts provided are not deemed to provide for unexpected results. However, present of the particular amount will overcome the prior art. For example, in claim 1 Applicant could incorporate --wherein the composition total 1250 mg.-- The claims would be patentable.

#### Summary

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

#### Correspondence

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Susan B. McCormick-Ewoldt whose telephone number is (571) 272-0981. The Examiner can normally be reached Monday through Thursday from 6:00 a.m. to 4:30 p.m.

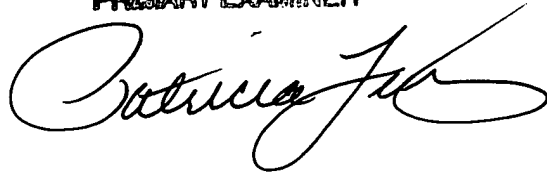
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If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Terry McKelvey, can be reached on (571) 272-0775. The official fax number for the group is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

sbme

**PATRICIA LEITH**  
**PRIMARY EXAMINER**

A handwritten signature in black ink, appearing to read 'Patricia Leith', written in a cursive style.